

REMARKS

This responds to the Office Action mailed on February 2, 2004.

Claims 1, 16-17, 21-22, 29, 34, 39, 43, 59-62 and 64-65 are amended, claims 2, 3, 18-20, 23, 25-26, 30-31, 36, 58, 66 and 67 are canceled (claims 40, 44 and 68-76 were previously canceled) and no claims are added; as a result, claims 1, 4-17, 21-22, 24, 27-29, 32-35, 37-57 and 59-65 are now pending in this application.

The amendments to the specification are to delete technically incorrect statements or to correct minor typographical errors. Those skilled in the art understand that flour, dog food, animal feed and unpopped popcorn as well popped popcorn are not frangible materials. No new matter has been added as a result.

The amendments made herein have been to clarify the claims and are not intended to limit the scope of equivalents to which any claim element may be entitled. The amendments to the claims have support throughout the specification. No new matter has been added as a result. Applicant respectfully requests reconsideration of the above-identified application in view of the amendments above and the remarks that follow.

Claims 2, 3, 18-20, 23, 25-26, 30, 31, 36, 40, 44, 58 and 66-76 have been canceled solely to advance the prosecution of the present application and without prejudice to their further prosecution in an appropriately filed continuing or divisional application.

§112 Rejection of the Claims

Claims 1-3, 5-39, 41-43, 46-47, 51-62, 65-67 were rejected under 35 USC § 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. Claims 2, 3, 18-20, 23, 25-26, 30, 31, 36, 58, 66 and 67 have been canceled thus rendering the rejection moot as to these claims.

Claim 1 has been amended. Reconsideration and withdrawal of this rejection is respectfully requested.

Claims 1-3, 5-39, 41-43, 46-47, 51-62, 65-67 were rejected under 35 USC § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject

matter which Applicant regards as the invention. Claims 2, 3, 18-20, 23, 25-26, 30, 31, 36, 58, 66 and 67 have been canceled thus rendering the rejection moot as to these claims.

Claim 1 has been amended. Reconsideration and withdrawal of this rejection is respectfully requested.

§102 Rejection of the Claims

Beer

Claims 1-3, 10, 13, 15, 27, 28, 41-43, 46, 47, 51-58 and 65 were rejected under 35 USC § 102(a) as being anticipated by Beer (U.S. Patent No. 6,213,645 B1). Claims 2, 3 and 58 have been canceled thus rendering the rejection moot as to these claims.

The Office Action states that Beer teaches a rectangular air-tight vacuum sealed reclosable bag made from a laminated sheet with an oxygen barrier, a moisture barrier, sealed with a pressure sensitive cold seal and a tin tie, clip or zipper closure and containing breakfast cereal as recited in the claims.

Beer describes a package fabricated from a flexible sheet material capable of being sealed for closing off the interior of the package from ambient atmosphere. The package is designed to hold a free flowing product. Furthermore, all examples given in Beer are of non-frangible free flowing products. Such examples include, "coffee (beans or ground), powdered drink mix, ready to eat breakfast cereal, lawn/garden chemicals, and the like." (See col. 3, lines 24-26). Therefore, when the term "ready to eat breakfast cereal" is taken in context with the like products listed above, Applicant interprets this to mean that Beer intends to include only ready to eat breakfast cereals which are "like" the other products mentioned, namely non-frangible and free flowing (e.g., granola, grits, etc.).

With respect to the comment on page 13, paragraph 49 of the Office Action, Applicant respectfully submits that the Examiner has inadvertently broadened Beer by taking the term "ready to eat breakfast cereals" out of context. It is improper to interpret the term "ready to eat breakfast cereals," which is part of a list of products that includes only non-frangible free flowing products, to include products which are frangible and not free flowing, namely "breakfast cereal flakes or puffs."

Applicant cannot find any description in Beer of non-free flowing products of any type such as a puffed cereal-based material (which is inherently not free-flowing).

In contrast, claim 1, as amended, recites, in part, an item comprising a frangible non-free flowing puffed cereal-based material.

Beer does not anticipate the claims, as amended. Applicant respectfully submits that claim 1 is allowable in its present form. Since claims 10, 13, 15, 27, 28, 41-43, 46, 47, 51-57 and 65 depend from and further define claim 1, these claims are also believed to be allowable in their present form. Notification to this effect is respectfully requested.

Kraft

Claims 1-3, 10, 15-17, 27-32, 41-43, 46-47, 51 and 58 were rejected under 35 USC § 102(b) as being anticipated by Kraft Foods Inc. (WO 9812110). Claims 2, 3, 30, 31, and 58 have been canceled thus rendering the rejection moot as to these claims.

The Office Action states that Kraft teaches a rectangular recloseable bag made from a single laminated sheet with an oxygen barrier, a moisture barrier, a metal layer (i.e., opaque), is vacuum sealed, held within an open container during filling only, has a semi-rigid portion (i.e., gusseted) and containing potato crisps, rice grains or flakes or flour. The Office Action further states on page 13 that Kraft teaches "a package of flowable products."

Kraft describes a complex apparatus and method for forming sealed packages at high speeds. The process requires formation of temporary seals in the package. The sealed packages hold a comminuted or other flowable product, which is not frangible, such as roasted and ground coffee and rice pieces, such as rice grains or flakes. Applicant can not find any mention in Kraft of packaging containing frangible products such as potato chips or flakes. Kraft discusses potato crisps (not potato chips) and rice flakes (known in the art to refer to a type of whole rice piece). And, as the Office Action admits, Kraft "teaches a package of flowable products."

Applicant cannot find a non-free flowing frangible puffed cereal-based material in Kraft.

In contrast, claim 1, as amended, recites, in part, an item comprising a frangible non-free flowing puffed cereal-based material.

Kraft does not anticipate the claims, as amended. Applicant respectfully submits that claim 1 is allowable in its present form. Since claims 10, 15-17, 27-29, 32, 41-43, 46-47 and 51

depend from and further define claim 1, these claims are also believed to be allowable in their present form. Notification to this effect is respectfully requested.

Young

Claims 1, 2, 15, 27, 28, 32, 41, 43 were rejected under 35 USC § 102(b) as being anticipated by Young (GB 1290836). Claim 2 has been canceled thus rendering the rejection moot as to this claim.

The Office Action states that Young teaches a sufficiently rigid, vacuum-sealed, gas-tight plastic bag (i.e., no carton) and fully nitrogen charged (i.e., there must be less than 1 ppm Hexanal) with breakfast cereal food including any food obtained by swelling, roasting or flaking (i.e., would include any crush resistance or resistance to compression no less than about 7.0 PSIA).

Young discusses hermetically sealed packages of foodstuffs which include eggs in the shell embedded in a container of breakfast cereal. The egg can be raw or boiled. Ham or bacon can be wrapped around the egg. The "cereal breakfast food" in Young includes, "any food obtained by the swelling, roasting, grinding, rolling or flaking of any cereal." Those skilled in the art understand that swelling refers to food increasing in size due to the absorption of a liquid such as water.

Applicant cannot find any products in Young which are frangible. Applicant also cannot find any products in Young which are puffed.

In contrast, claim 1, as amended, recites, in part, an item comprising a frangible non-free flowing puffed cereal-based material.

Young does not anticipate the claims, as amended. Applicant respectfully submits that claim 1 is allowable in its present form. Since claims 15, 27, 28, 32, 41 and 43 depend from and further define claim 1, these claims are also believed to be allowable in their present form. Notification to this effect is respectfully requested.

Ray

Claims 1-3, 41, 58, 65 were rejected under 35 USC § 102(b) as being anticipated by Ray (U.S. Patent No. 2,370,419). Claims 2, 3 and 58 have been canceled thus rendering the rejection moot as to these claims.

The Office Action references only col. 1, lines 1-35; col. 1, line 49 to col. 2, line 2; col. 3, lines 1-56; col. 4, lines 59-63 and col. 5, lines 10-23. The Office Action further states on page 14 of the Office Action that Applicant argues that Ray does not teach a frangible item and notes that Ray teaches cereals, frozen vegetables and coffee. Applicant still cannot find any discussion of frangible materials in Ray and again notes that the term "cereals" needs to be taken in context with the other non-frangible commodities listed in Ray.

Ray discusses a gasproof container for use with food stuffs, emergency rations, medical supplies and other commodities or articles which it is desired to maintain free from contamination with poison gases such as mustard gas and the like.

In contrast, claim 1, as amended, recites, in part, an item comprising a frangible non-free flowing puffed cereal-based material.

Ray does not anticipate the claims, as amended. Applicant respectfully submits that claim 1 is allowable in its present form. Since claims 41 and 65 depend from and further define claim 1, these claims are also believed to be allowable in their present form. Notification to this effect is respectfully requested.

Leal Pereira Da Silva

Claims 1, 2, 12, 15, 27-28, 41, 58, 66-67 were rejected under 35 USC § 102(b) as being anticipated by Leal Pereira Da Silva (U.S. Patent No. 5,887,409). Claims 2, 58, 66 and 67 have been canceled thus rendering the rejection moot as to these claims.

The Office Action states that Leal Pereira Da Silva (hereinafter "Da Silva") teaches nuts or tablets which would include a crush resistance between 14.7 and 100 PSIA and are normally damaged during transport in a metal drum, are vacuum sealed in a co-extruded laminate rectangular bags with a heat seal at the open end such that the exterior has a texture and the contents are essentially oxygen free as recited in the various claims.

Da Silva discusses a method of packaging a particulate material. Such particulate materials can include nuts. Da Silva notes that due to the ullage space in conventional drums, which allow nuts to move during transport, this movement can cause attrition of the nuts.

Applicant cannot find any discussion of frangible materials in Da Silva, let alone a frangible non-free flowing puffed cereal-based material.

In contrast, claim 1, as amended, recites, in part, an item comprising a frangible non-free flowing puffed cereal-based material.

Da Silva does not anticipate the claims, as amended. Applicant respectfully submits that claim 1 is allowable in its present form. Since claims 12, 15, 27-28 and 41 depend from and further define claim 1, these claims are also believed to be allowable in their present form. Notification to this effect is respectfully requested.

§103 Rejection of the Claims

Claims 5-8, 14

Claims 5-8, 14 were rejected under 35 USC § 103(a) as being unpatentable over Kraft Foods Inc. (WO9812110) as applied to claims 1-3, 10, 15-17, 27-32, 41-43, 46, 47, 51 and 58 above further in view of Giacomani (U.S. Patent No. 6,251,450). This rejection is respectfully traversed.

The Office Action asserts that Kraft teaches a potato chips bag but is silent in teaching the location of any type of premium or coupon, or two chambers, or a pressure sensitive label affixed to the exterior of the bag, but that Giacomani teaches the conventional placement of a premium or coupon in a potato chips bag externally, internally, or in a secondary compartment and that it was notoriously well known to provide a coupon or label affixed to the exterior portion of the bag with a pressure sensitive adhesive. The Office Action concludes that it would have been obvious to modify Kraft to include a premium/coupon externally, with or without a pressure sensitive adhesive, internally or in a secondary compartment since this is a well known feature of potato chip bags and one would have been substituting one conventional bag design for another.

Applicant respectfully submits that the Office Action has not established the *prima facie* obviousness of the present claims. To establish a *prima facie* case of obviousness, three basic

criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant's disclosure. MPEP 2142 (citing In re Vaeck, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991)).

Furthermore, claims 5-8 and 14 are dependent claims. The additional limitations provided in dependent claims cannot by themselves be rendered obvious over the cited references if the independent claim from which it depends is determined to be nonobvious.

Kraft does not teach or suggest the claimed invention. As noted above, Kraft discusses a complex apparatus and method for forming sealed packages at high speeds. The sealed packages hold a comminuted or other flowable product, which is not frangible, such as roasted and ground coffee. Applicant further can not find any mention in Kraft of packaging containing frangible products such as potato chips or flakes. Kraft discusses "potato crisps" which are distinguishable from "potato chips" and cannot arbitrarily be assigned the properties associated with "potato chips."

Giacoman does not overcome the deficiencies of the primary reference. Giacoman discusses food packaging incorporating a removable prize, while attempting to solve the problem of a prize commingling with the enclosed food.

Clearly, the methods and products in the primary reference and the methods and products in the secondary reference are fundamentally different from each other and such critical differences must be recognized. In re Bond, 910 F.2d 831, 834, 15 USPQ2d 1566, 1568 (Fed. Cir. 1990), *reh'g denied*, 1990 U.S. App. LEXIS 19971 (Fed. Cir. 1990).

There is further no indication in either reference of any appreciation of the problem being solved by Applicant's invention. Since neither reference recognizes the problem solved in the present invention, neither can suggest its solution. See MPEP 2141.01(a).

There is no motivation or suggestion in the references or in the knowledge generally available to an art worker to combine the reference teachings as suggested. Applicant requests the Examiner to either provide actual evidence of such motivation or withdraw this rejection.

In any case, Applicant is not claiming to be the first to include a coupon or premium externally, internally or in a secondary compartment. Applicant is the first however, to provide a package comprising a bag formed of a material comprising a laminate, a co-extrusion of at least two materials or a combination thereof, the bag having an exterior portion, an interior portion, an oxygen barrier and a moisture barrier, wherein the bag is vacuum-sealed; and an item comprising a frangible non-free flowing puffed cereal-based material with a water activity between about 0.2 and 0.4 and a crush resistance or resistance to compression no less than about 7.0 PSIA, the item being held in the interior portion of the bag, the interior portion of the bag having less than about 1 ppm hexanal therein, as recited in claim 1, as amended, in combination with the elements in each of claims 5-8 and 14.

The references neither independently, or combined, contain each and every element of Applicant's claimed invention. (When evaluating the scope of a claim, every limitation in the claim must be considered. In re Ochiai, 37 USPQ2d 1127 (Fed. Cir. 1997).

Accordingly, Applicant respectfully submits that independent claim 1 and claims 5-8 and 14 which depend from claim 1, are patentably distinct from the cited references, either alone or in combination. Claims 5-8 and 14, each viewed as a whole, are not suggested by the cited references and not obvious under 35 USC § 103(a). Applicant thus respectfully requests reconsideration and withdrawal of this rejection under 35 USC §103(a) over Kraft in view of Giacomani and allowance of claims 5-8 and 14.

Claims 18-23 and 26

Claims 18-23 and 26 were rejected under 35 USC § 103(a) as being unpatentable over Beer as applied to claims 1-3, 10, 13, 15, 27, 28, 41-43, 46, 47, 51-58 and 65 further in view of Bedenk et al. (U.S. Patent No. 3,708,308). This rejection is respectfully traversed. Claims 18-20, 23 and 26 have been canceled thus rendering this rejection moot as to these claims.

The Office Action states that Beer teaches breakfast cereal, but is silent in teaching biscuits, shreds, puffed pieces, etc, as recited in claims 18-23 and 26, and that Bedenk is relied

on as evidence of the conventionality breakfast cereal such as shreds, biscuits, puffed pieces, such as spheres or flakes, and pellets. The Office Action concludes that it would have been obvious to include biscuits, shreds, puffed pieces, such as spheres or irregular flakes, pellets, since one would have been substituting one cereal form for another. The Office Action further concludes that it would have been further obvious to select a pillow shaped cereal since biscuit forms include pillow shapes.

Applicant again respectfully submits that the Examiner has not established the *prima facie* obviousness of the present claims.

Beer does not teach or suggest the claimed invention. As noted above, Beer discusses a package fabricated from a flexible sheet material capable of being sealed for closing off the interior of the package from ambient atmosphere. The package is designed to hold a free flowing product.

Bedenk does not overcome the deficiencies of the primary reference. Bedenk discusses production of puffed ready-to-eat cereal products containing corn. Bedenk improves such production by subjecting the corn to intensive milling to increase its free starch content.

Clearly, the methods and products in the primary reference and the methods and products in the secondary reference are fundamentally different from each other and such critical differences must be recognized. In re Bond, *supra*.

None of the references recognize the problem solved in the present invention and so can not suggest its solution. See MPEP 2141.01(a).

Motivation to combine the references must come from within the references themselves and can not be generated by "hindsight or reconstruction." In this instance, there is simply no suggestion or motivation, either in the cited references themselves or in the knowledge generally available to an art worker, to combine the reference teachings as suggested. Applicant again requests the Examiner to either provide objective evidence of such motivation or withdraw this rejection.

In any case, Applicant is not claiming to be the first to package conventional breakfast cereal having various shapes. Applicant is the first however, to provide a package as recited in claim 1, as amended, in combination with the elements in each of claims 21 and 22. Further, the additional limitations provided in dependent claims cannot by themselves be rendered obvious

over the cited references if the independent claim from which the claim depends is determined to be nonobvious. As claims 21-22 depend from and further define claim 1, claims 21-22 are also believed to be allowable.

Accordingly, Applicant respectfully submits that claims 21-22 are patentably distinct from the cited references, either alone or in combination. Claims 21-22 each viewed as a whole, are not suggested by the cited references nor obvious under 35 USC § 103(a). Applicant thus respectfully requests reconsideration and withdrawal of this rejection under 35 USC §103(a) over Beer as applied to claims 1-3, 10, 13, 15, 27, 28, 41-43, 46-47, 51-58, 65 further in view of Bedenk.

Claim 24

Claim 24 was rejected under 35 USC § 103(a) as being unpatentable over Beer as applied to claims 1-3, 10, 13, 15, 27, 28, 41-43, 46, 47, 51-58 and 65 further in view of Schwab et al.(U.S. Patent No. 5,342,635). This rejection is respectfully traversed.

The Office Action states that Beer is silent in teaching marbits and that Schwab teaches that it is well known to include marbits with cereal packages for a pleasing variety. The Office Action concludes that it would have been obvious to further include marbits with the cereal of Beer since it was known that this is a pleasing variety of cereal and one would have been substituting one conventional type of packaged cereal for another.

Applicant again respectfully submits that the Examiner has not established the *prima facie* obviousness of the present claims.

Beer does not teach or suggest the claimed invention for all the reasons stated above. Applicant further notes that Beer is attempting to solve the problem of providing a flexible package with sealed edges and easy to open mouth.

Schwab does not overcome the deficiencies of the primary reference. Schwab discusses puffed edible foams and high intensity microwave methods of preparation. Schwab is attempting to solve the problem of providing edible foam products with extended bowl lives and high natural flavor levels.

Clearly, the products in the primary reference and the products in the secondary reference are fundamentally different from each other and such critical differences must be recognized. In re Bond, supra.

None of the references recognize the problem solved in the present invention and so cannot suggest its solution. See MPEP 2141.01(a).

Again, motivation to combine the references must come from within the references themselves and can not be generated by "hindsight or reconstruction." In this instance, there is simply no suggestion or motivation, either in the cited references themselves or in the knowledge generally available to an art worker, to combine the reference teachings as suggested. Applicant requests the Office Action to either provide evidence of such motivation or withdraw this rejection.

In any case, Applicant is not claiming to be the first to package marbits. Applicant is the first however, to provide a package as recited in claim 1, as amended, in combination with the elements in claim 24. Further, the additional limitations provided in dependent claims cannot by themselves be rendered obvious over the cited references if the independent claim from which the claim depends is determined to be nonobvious. As claim 24 depends from and further defines claim 1, claim 24 is also believed to be allowable.

Accordingly, Applicant respectfully submits that independent claim 1, and claim 24 which depends from claim 1, are patentably distinct from the cited references, either alone or in combination. Claim 24, viewed as a whole, is not suggested by the cited references and not obvious under 35 USC § 103(a). Applicant thus respectfully requests reconsideration and withdrawal of this rejection under 35 USC §103(a) over Beer as applied to claims 1-3, 10, 13, 15, 27-28, 41-43, 46-47, 51-58, 65 further in view of Schwab and allowance of claim 24.

Claim 25

Claim 25 was rejected under 35 USC § 103(a) as being unpatentable over Beer as applied to claims 1-3, 10, 13, 15, 27, 28, 41-43, 46, 47, 51-58 and 65 further in view of DiPoto et al.(U.S. Patent No. 5,558,930). This rejection is respectfully traversed.

The Office Action states that Beer is silent in teaching unpopped popcorn and that DiPoto teaches both cereal and unpopped popcorn require the same barrier packaging (i.e., moisture free

environment). The Office Action concludes that it would have been obvious to include unpopped popcorn in the package of Beer since unpopped popcorn has similar packaging requirements and one would have been substituting one food product requiring a moisture barrier package for another.

Applicant again respectfully submits that the Examiner has not established the *prima facie* obviousness of the present claims.

Beer does not teach or suggest the claimed invention for all the reasons stated above.

DiPoto does not overcome the deficiencies of the primary reference. DiPoto discusses heat sealable, high moisture barrier films produced by coextrusion and compression rolled orientation.

Once again, the methods and products in the primary reference and the methods and products in the secondary reference are fundamentally different from each other and such critical differences must be recognized. In re Bond, supra.

None of the references recognize the problem solved in the present invention and so can not suggest its solution. See MPEP 2141.01(a).

Motivation to combine the references must come from within the references themselves and can not be generated by "hindsight or reconstruction." In this instance, there is simply no suggestion or motivation, either in the cited references themselves or in the knowledge generally available to an art worker, to combine the reference teachings as suggested. Applicant again requests the Examiner to either provide objective evidence of such motivation or withdraw this rejection.

In any case, Applicant is not claiming to be the first to package unpopped popcorn. Applicant is the first however, to provide a package as recited in claim 1, as amended, in combination with the elements in claim 25. Further, the additional limitations provided in dependent claims cannot by themselves be rendered obvious over the cited references if the independent claim from which the claim depends is determined to be nonobvious. As claim 25 depends from and further defines claim 1, claim 25 is also believed to be allowable.

Accordingly, Applicant respectfully submits that claim 1, and claim 25 which depends from claim 1, are patentably distinct from the cited references, either alone or in combination. Claim 25 viewed as a whole, is not suggested by the cited references nor obvious under 35 USC

§ 103(a). Applicant thus respectfully requests reconsideration and withdrawal of this rejection under 35 USC §103(a) over Beer as applied to claims 1-3, 10, 13, 15, 27-28, 41-43, 46-47, 51-58, 65 further in view of DiPoto.

Claims 9, 11, 33-38

Claims 9, 11, 33-38 were rejected under 35 USC § 103(a) as being unpatentable over Beer as applied to claims 1-3, 10, 13, 15, 27, 28, 41-43, 46, 47, 51-58 and 65 above further in view of Galomb (U.S. Patent No. 6,245,367). This rejection is respectfully traversed. Claim 36 has been canceled, thus rendering this rejection moot as to this claim.

The Office Action states, regarding claim 9 and 11, that Beer is silent in teaching a translucent bag or transparent window and that Galomb further teaches if desired, one may provide translucent walls or even a transparent window to view the product. The Office Action concludes that it would have been an obvious matter of design choice to modify the walls of Beer to provide a translucent bag or window since Galomb teaches providing translucent walls or even a transparent window for a cereal bag may be done if desired.

The Office Action further states that Beer is silent in teaching that a breakfast cereal bag has two compartments, two different products (one particulate, one non-particulate) or the specific water activity as recited in claims 33-38, but that Galomb teaches packaging two different products, including breakfast cereals in a two compartment bag, wherein the water activity is at least about 0.1 to 0.7 for a nonparticulate portion and 0.2-0.4 for the particulate for the convenience of eating together. The Office Action concludes that it would have been obvious to modify Beer and include a non-particulate product with the cereal with these water activities since this provides the convenience of eating the product from the bag.

Applicant again respectfully submits that the Examiner has not established the *prima facie* obviousness of the present claims.

Beer does not teach or suggest the claimed invention for all the reasons stated herein. Again, the package in Beer is designed to hold a free flowing product.

Galomb does not overcome the deficiencies of the primary references. Galomb discusses a bowl bag, i.e., a flexible package for holding a product which is arranged to be opened to form a bowl to enable the product to be prepared therein and/or eaten therefrom.

Once again, the methods and products in the primary reference and the methods and products in the secondary reference are fundamentally different from each other and such critical differences must be recognized. In re Bond, supra.

None of the references recognize the problem solved in the present invention and so can not suggest its solution. See MPEP 2141.01(a).

Motivation to combine the references must come from within the references themselves and can not be generated by "hindsight or reconstruction." In this instance, there is simply no suggestion or motivation, either in the cited references themselves or in the knowledge generally available to an art worker, to combine the reference teachings as suggested. Applicant again requests the Examiner to either provide objective evidence of such motivation or withdraw this rejection.

In any case, Applicant is not claiming to be the first to provide a package having two compartments or food products with certain water activities. Applicant is the first however, to provide a package as recited in claim 1, as amended, in combination with the elements in each of claims 33-35 and 37-38. Further, the additional limitations provided in dependent claims cannot by themselves be rendered obvious over the cited references if the independent claim from which the claim depends is determined to be nonobvious. As claims 33-35 and 37-38 depend from and further define claim 1, claims 33-35 and 37-38 are also believed to be allowable.

Accordingly, Applicant respectfully submits that independent claim 1, and claims 33-35 and 37-38 which depend from claim 1, are patentably distinct from the cited references, either alone or in combination. Claims 33-35 and 37-38, each viewed as a whole, are not suggested by the cited references and not obvious under 35 USC § 103(a). Applicant thus respectfully requests reconsideration and withdrawal of this rejection under 35 USC §103(a) over Beer as applied to claims 1-3, 10, 13, 15, 27-28, 41-43, 46-47, 51-58, 65 above further in view of Galomb.

Claim 39

Claim 39 was rejected under 35 USC § 103(a) as being unpatentable over Kraft Foods Inc. as applied to claims 1-3, 10, 15-17, 27-32, 41-43, 46, 47, 51 and 58 above, further in view of Hellweg et al.(U.S. Patent No. 5,523,109). This rejection is respectfully traversed.

The Office Action states that Kraft teaches cereal and flour but is silent in teaching treating oat flour to prevent rancidity in oat flour containing products, but that Hellweg teaches treating oat flour to inactivate enzymes, and thus prevent rancidity in oat flour cereals. The Office Action concludes that it would have been obvious to treat oat flour to prevent rancidity since it was known [to treat] oat flour/oat flour products to inactivate enzymes in oat flour prior to processing.

Applicant again respectfully submits that the Examiner has not established the *prima facie* obviousness of the present claims.

Kraft does not teach or suggest the claimed invention for all the reasons stated above.

Hellweg does not overcome the deficiencies of the primary reference. Hellweg discusses oat flour and methods of preparation to provide improved conditioned whole grain oat flours for the improved production of whole grain ready-to-eat breakfast cereals, especially puffed cereals.

Once again, the methods and products in the primary reference and the methods and products in the secondary reference are fundamentally different from each other and such critical differences must be recognized. In re Bond, supra.

None of the references recognize the problem solved in the present invention and so can not suggest its solution. See MPEP 2141.01(a).

Motivation to combine the references must come from within the references themselves and can not be generated by "hindsight or reconstruction." In this instance, there is simply no suggestion or motivation, either in the cited references themselves or in the knowledge generally available to an art worker, to combine the reference teachings as suggested. Applicant again requests the Examiner to either provide objective evidence of such motivation or withdraw this rejection.

In any case, Applicant is not claiming to be the first to provide pretreated oat flour. Applicant is the first however, to provide a package as recited in claim 1, as amended, in combination with the elements in claim 39. Further, the additional limitations provided in dependent claims cannot by themselves be rendered obvious over the cited references if the independent claim from which the claim depends is determined to be nonobvious. As claim 39 depends from and further define claim 1, claim 39 is also believed to be allowable.

Accordingly, Applicant respectfully submits that independent claim 1, and claim 39 which depends from claim 1, are patentably distinct from the cited references, either alone or in combination. Claim 39 viewed as a whole, is not suggested by the cited references and not obvious under 35 USC § 103(a). Applicant thus respectfully requests reconsideration and withdrawal of this rejection under 35 USC §103(a) over Kraft Foods Inc. as applied to claims 1-3, 10, 15-17, 27-32, 41-43, 46-47, 51,58 above, further in view of Hellweg.

Claims 59-61

Claims 59-61 were rejected under 35 USC § 103(a) as being unpatentable over Leal Pereira Da Silva as applied to claims 1, 2, 15, 27, 28, 41, 58 and 66-67 further in view of Carlblom et al.(U.S. Patent No. 5,728,439). This rejection is respectfully traversed.

The Office Action states that Da Silva teaches oxygen sensitive food items that must be kept in an oxygen impervious laminate but is silent in teaching a particular permeability as recited in claims 59-61, but that Carlblom teaches 0.013-0.05 cc per sq-in per day as recited in claims 59-61 for oxygen sensitive food bags. The Office Action concludes that it would have been obvious to modify Da Silva and include 0.013-0.05 cc per sq-in per day and the recited structures of claims 59-61 since one would have been substituting one bag feature for another for oxygen sensitive food bag(s).

Applicant again respectfully submits that the Examiner has not established the *prima facie* obviousness of the present claims.

Kraft does not teach or suggest the claimed invention for all the reasons stated herein.

Carlblom does not overcome the deficiencies of the primary reference. Carlblom discusses a tinted multilayer packaging material for use as a container for products such as malt beverages.

Once again, the methods and products in the primary reference and the products in the secondary reference are fundamentally different from each other and such critical differences must be recognized. In re Bond, supra.

None of the references recognize the problem solved in the present invention and so can not suggest its solution. See MPEP 2141.01(a).

Motivation to combine the references must come from within the references themselves and can not be generated by "hindsight or reconstruction." In this instance, there is simply no suggestion or motivation, either in the cited references themselves or in the knowledge generally available to an art worker, to combine the reference teachings as suggested. Applicant again requests the Examiner to either provide objective evidence of such motivation or withdraw this rejection.

In any case, Applicant is not claiming to be the first to provide a particular permeability for a package. Applicant is the first however, to provide a package as recited in claim 1, as amended, in combination with the elements in each of claim 59-61. Further, the additional limitations provided in dependent claims cannot by themselves be rendered obvious over the cited references if the independent claim from which the claim depends is determined to be nonobvious. As claims 59-61 depend from and further define claim 1, claims 59-61 are also believed to be allowable.

Accordingly, Applicant respectfully submits that independent claim 1, and claims 59-61 which depend from claim 1, are patentably distinct from the cited references, either alone or in combination. Claims 59-61, each viewed as a whole, are not suggested by the cited references and not obvious under 35 USC § 103(a). Applicant thus respectfully requests reconsideration and withdrawal of this rejection under 35 USC §103(a) over Leal Pereira Da Silva as applied to claims 1, 2,15,27-28, 41, 58, 66-67 further in view of Carlblom.

Claim 62

Claim 62 was rejected under 35 USC § 103(a) as being unpatentable over Beer as applied to claims 1-3, 10, 13, 15, 27, 28, 41-43, 46, 47, 51-58 and 65 further in view of Bianchini et al.(U.S. Patent No. 5,487,940). This rejection is respectfully traversed.

The Office Action states that Beer teaches an oxygen barrier layer and a moisture barrier layer, but is silent in teaching a metallized polymeric composite and PP, PE, PET or PLA as recited in claim 62 and that Bianchini teaches barrier composite films for foods that have mechanical strength and provide oxygen and moisture barriers as in Beer and Bianchini, and further include a metallized polymeric layer as the moisture barrier and polyethylene. The Office Action concludes that it would have been obvious to include a metallized polymeric layer

as the moisture barrier and a substrate of polyethylene, since one would have been substituting one conventional moisture barrier for another for the same purposes: oxygen/moisture barriers film-based food packages with sufficient mechanical strength.

Applicant again respectfully submits that the Examiner has not established the *prima facie* obviousness of the present claims.

Beer does not teach or suggest the claimed invention for all the reasons stated above.

Bianchini does not overcome the deficiencies of the primary reference. Bianchini discusses a polymeric film structure having improved oxygen and moisture barrier characteristics.

Once again, the products in the primary reference and the products in either of the mentioned secondary references are fundamentally different from each other and such critical differences must be recognized. In re Bond, supra.

None of the references recognize the problem solved in the present invention and so can not suggest its solution. See MPEP 2141.01(a).

Motivation to combine the references must come from within the references themselves and can not be generated by "hindsight or reconstruction." In this instance, there is simply no suggestion or motivation, either in the cited references themselves or in the knowledge generally available to an art worker, to combine the reference teachings as suggested. Applicant again requests the Examiner to either provide objective evidence of such motivation or withdraw this rejection.

Applicant is the first to provide a package as recited in claim 1, as amended, in combination with the elements in each of claims 62-64. Further, the additional limitations provided in dependent claims cannot by themselves be rendered obvious over the cited references if the independent claim from which the claim depends is determined to be nonobvious. As claims 62-64 depend from and further define claim 1, claims 62-64 are also believed to be allowable.

Accordingly, Applicant respectfully submits that independent claim 1 and claims 62-64 which depend from claim 1, are patentably distinct from the cited references, either alone or in combination. Claims 62-64, each viewed as a whole, are not suggested by the cited references and not obvious under 35 USC § 103(a). Applicant thus respectfully requests reconsideration and

withdrawal of this rejection under 35 USC §103(a) over Beer as applied to claims 1-3, 10, 13, 15, 27, 28, 32, 41-43, 46-47, 51-58, 65 further in view of Bianchini.

Applicant further states, with regard to each and every one of the rejections under 35 USC 103(a) presented in the Office Action, that there is simply no suggestion in any of the primary references *as to the desirability* of providing the additional element(s) suggested by the Office Action from the secondary reference. There is further no indication in any of the cited references of any appreciation of the problem being solved by Applicant's invention. When a person, having the references before him and not cognizant of Applicant's disclosure, would not be informed that a problem (solved by Applicant's claimed invention) ever existed, such references (which never recognized the problem) *could not have suggested its solution*. Combining references in this manner is improper. In re Shaffer, 229 F.2d 476, 108 USPQ 326, 329 (CCPA 1956). Focusing on the obviousness of substitutions and differences instead of on the invention as a whole is a legally improper way to simplify the difficult determination of obviousness. Hybritech Inc. v. Monoclonal Antibodies, Inc., 802 F.2d 1367, 231 USPQ 81, 93 (Fed. Cir. 1986).

It has also been established that the Office Action must provide specific, objective evidence of record for a finding of a suggestion or motivation to combine reference teachings and must explain the reasoning by which the evidence is deemed to support such a finding. In re Sang Su Lee, 277 F.3d, 1338, 61 USPQ2d 1430 (Fed. Cir. 2002). The various statements in the Office Action that it would have been obvious to modify the primary reference and include an element from the secondary reference are conclusory statements of subjective belief. (e.g., "It would have been obvious to modify Kraft to include a premium/coupon externally, internally or in a secondary compartment.") Conclusory statements do not adequately address the issue of motivation to combine. In re Sang Su Lee, *supra*. Essentially, the current invention has been used as a roadmap to identify the purpose leading one to make the combinations noted in the Office Action. The Office Action has not provided objective evidence of a suggestion or motivation to combine the references for any of the combinations noted, and these rejections should be withdrawn.

An additional requirement of the *prima facie* case is that the *references must teach or suggest all the claim limitations*. Since all of the elements of the claims are not found in the references, Applicant assumes the Examiner is taking official notice of the missing elements from an undisclosed source. Applicant respectfully objects to the taking of official notice, and pursuant to MPEP 2144.03, Applicant traverses the assertion of official notice and requests that the Examiner cite a reference that teaches the missing element. If the Examiner cannot cite a reference that teaches the missing element, Applicant respectfully requests that the Examiner provide an affidavit that describes how the missing element is present in the prior art. If the Examiner cannot cite a reference or provide an affidavit, Applicant requests withdrawal of the rejections and reconsideration and allowance of the claims.

AMENDMENT AND RESPONSE UNDER 37 CFR § 1.116 - EXPEDITED PROCEDURE

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Title: PACKAGE AND METHOD

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CONCLUSION

Applicant respectfully submits that the claims are in condition for allowance and notification to that effect is earnestly requested. The Examiner is invited to telephone Applicant's attorney 515-233-3865 to facilitate prosecution of this application.

If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 19-0743.

Respectfully submitted,

WAYNE I. KNIGGE ET AL.

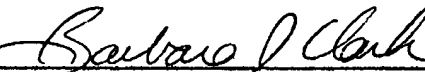
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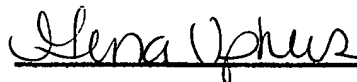


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CERTIFICATE UNDER 37 CFR 1.8: The undersigned hereby certifies that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail, in an envelope addressed to: Mail Stop AF, Commissioner of Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on this 2 day of June, 2004.

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